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ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

_____)	
In re)	Chapter 11 Case
)	
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590 (DML)
)	Jointly Administered
Debtors.)	
_____)	

**MOTION OF DEBTORS TO REJECT SERVICE AGREEMENT BETWEEN
ALGONQUIN GAS TRANSMISSION COMPANY AND MIRANT CANAL, LLC**

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors in possession, file this Motion (the “Motion”) pursuant to section 365(a) of title 11, United States Code (11 U.S.C. §§ 101 et seq.) (the “Bankruptcy Code”) for authority to reject that certain Service Agreement (Applicable to Rate Schedule AFT-CL) (Contract No. 95500R1) dated January 1, 1999 between Algonquin Gas Transmission Company (“Algonquin”) and Mirant Canal, LLC, successor in interest to Southern Energy Canal, LLC, (“Mirant Canal”)

(the “Contract”), which is described below in greater detail and attached hereto as Exhibit A.¹ In support thereof the Debtors represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This Court has jurisdiction to grant the relief requested herein. Specifically, Algonquin has blanket certificate authority to enter into, and terminate, the Contract pursuant to 18 C.F.R. Part 284, Subpart G of the regulations of the Federal Energy Regulatory Commission (“FERC”), without FERC approval.

PROCEDURAL BACKGROUND

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), Mirant Corporation and 82 of its direct and indirect subsidiaries (collectively, the “Debtors”) filed voluntary chapter 11 petitions. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of title 11 of the United States Code (the “Bankruptcy Code”).

3. The Cases are Jointly Administered. This Court has entered orders approving the joint administration of the Debtors’ chapter 11 cases.

4. The Committees. Three official committees (collectively, the “Committees”) have been appointed by the Office of the United States Trustee for the Northern District of Texas (“UST”) in these administratively consolidated cases.

5. The Examiner. On April 7, 2004, this Court authorized the UST to appoint an examiner in these cases to analyze certain potential causes of action and act as a referee with

¹ Not all parties were served with the Contract. Any party may request a copy of the Contract by making a written request to the Debtors’ counsel.

respect to certain disputes that arise among the Debtors, the Committees, or other parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

FACTUAL BACKGROUND

6. Under the Contract, Algonquin agreed to provide Mirant Canal with firm transportation of natural gas from the Interconnection at Algonquin's G-System in Bourne, Massachusetts and the Canal Lateral to the Canal Plant Extension located at the Mirant Canal Plant in Sandwich, Massachusetts (the "Mirant Canal Plant"). The "Canal Lateral" is the pipe owned by Algonquin, which runs from its mainline to the Canal Plant Extension. The "Canal Plant Extension" is the pipe owned by Mirant Canal, which runs from the Mirant Canal Plant to the Canal Lateral. Mirant Canal entered into the Contract to establish a means of transporting gas on a firm basis to the Mirant Canal Plant. The cost to Mirant Canal for the transportation services provided by Algonquin totals approximately \$160,000 each month. The term of the Contract became effective as of January 1, 1999 and continues in effect until November 1, 2009.

RELIEF REQUESTED

7. By this Motion, the Debtors hereby seek approval of the rejection of the Contract under section 365 of the Bankruptcy Code. The Debtors specifically direct this Court's attention to the fact that the Contract is a contract over which FERC has certain jurisdictional authority. However, as discussed below, the Debtors submit that there is no jurisdictional impediment to this Court granting the Motion.

8. The Debtors submit that the rejection of the Contract may, and should, be approved by this Court. Algonquin has blanket certificate authority to enter into the Contract pursuant to 18 C.F. R. Part 284, Subpart G of FERC's regulations, and, as such, the agreements did not require specific FERC approval to allow the Debtors and Algonquin to enter into the Contract. This blanket certificate authority granted to Algonquin contains pre-granted automatic abandonment authority, and so FERC approval is also not required to "abandon" the service and

terminate the Contract. 18 C.F. R. § 84.221(d). Certainly, if the parties have the authority to enter into and terminate the Contract without seeking individual FERC approval due to Algonquin's blanket certificate authorization, the Debtors should be permitted to reject the Contract under the unique facts and circumstances presented here.²

BASIS FOR RELIEF

9. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, “subject to the court’s approval, may assume or reject an executory contract of the debtor.” 11 U.S.C. § 365(a). An executory contract is defined as one where material performance is due on both sides such that the failure of either party to complete performance would constitute a material breach of the contract excusing performance of the non-breaching party. *See In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 436 (5th Cir. 2002); *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994).

10. The Contract is an executory contract because it requires (i) Algonquin to provide to Mirant Canal the on-going right to use the Canal Lateral and (ii) Mirant Canal to pay for these rights in the form of monthly Reservation Charges. Moreover, failure by either party to continue these obligations would constitute a material breach of the Contract, excusing the performance of the non-breaching party. Therefore, the Contract is undoubtedly an executory contract that may be rejected under section 365 of the Bankruptcy Code. *See, e.g., In re El Paso Refinery, L.P.*, 220 B.R. 37, 39 n.1 (Bankr. W.D. Tex. 1998) (contract requiring debtor to provide jet fuel to government held to be executory); *In re Cajun Power Cooperative, Inc.*, 230 B.R. 693, 702 (Bankr. D. La. 1999) (supply contracts entered into by debtor electric cooperative held executory). Further, “[s]ection 365 allows a [debtor] to relieve the bankruptcy estate of

² Although Algonquin has not specifically requested termination of the Contract pursuant to this Motion, conduct of a party (or lack thereof) may constitute consent. *See, e.g., Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 285 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1769 (2003).

burdensome agreements which have not been completely performed.” *Stewart Title Guaranty Co. v. Old Republic National Title Insurance Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (quoting *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)).

Rejection Of the Contract Is Within the Debtors’ Business Judgment.

11. As noted previously, rejection of an executory contract requires court approval. A debtor’s decision to assume or reject will be approved, provided that it meets the “business judgment” test, pursuant to which rejection of an executory contract is appropriate if such rejection would benefit the estate. *See Richmond Leasing v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000) (“[A] bankruptcy court applies the business judgment rule to evaluate a trustee’s rejection decision...”); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n. 16 (8th Cir. 1997) (debtor’s request to assume or reject contract should be approved where not manifestly unreasonable or made in bad faith).

12. The “business judgment” test is satisfied where the assumption or rejection of an executory contract enhances the value of the estate. *See Richmond Leasing*, 762 F.2d at 1309. Upon a finding that a debtor has exercised sound business judgment in determining whether to assume or reject an executory contract, a court should approve the decision pursuant to section 365(a) of the Bankruptcy Code. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). “The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.” *Bildisco*, 465 U.S. at 528 (citing H.R.Rep. No. 95-595, p. 220 (1977)).

13. Since the date on which Mirant Canal entered into the Contract, the Debtors’ business operations have changed. Mirant Canal originally entered into the Contract for the sole purpose of establishing a means of firm transportation for gas to the Mirant Canal Plant. However, the need of the Debtors for firm transportation of gas at the Mirant Canal Plant no longer exists. As such, the burdens of the Contract far outweigh the benefits. The Debtors’

business judgment is that the Contract does not benefit the Debtors' estates and should be rejected.

CONCLUSION

WHEREFORE, the Debtors respectfully request the relief requested herein and such other and further relief as this Court deems just and proper.

Dated: Fort Worth, Texas
July 9, 2004

HAYNES AND BOONE, LLP

Robin Phelan
State Bar No. 15903000

-and-

By Michelle C. Campbell

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State Bar No. 11998025
Michelle C. Campbell
State Bar No. 24001828
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Miami, Florida 33131
(305) 371-2700

ATTORNEYS FOR THE DEBTORS
AND DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she provided a true and correct copy of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the Limited Service List (without exhibit) and the addressees set forth below (with exhibit) via U.S. mail on the 9th day of July, 2004.

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Algonquin Gas Transmission Company
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/s/ Michelle C. Campbell

CONTRACT NO. 95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

This Agreement ("Agreement") is made and entered into this 1st day of January 1999, by and between Algonquin Gas Transmission Company, a Delaware Corporation (herein called "Algonquin"), and Southern Energy Canal, LLC, a Massachusetts corporation (herein called "Customer" whether one or more persons).

WHEREAS, Algonquin and Canal Electric Company ("Canal") and Montaup Electric Company are parties to an existing service agreement dated July 25, 1995, under Algonquin's Rate Schedule AFT-CL (Algonquin's Contract No. 95500); and

WHEREAS, Customer entered into a permanent capacity release transaction on December 31, 1998, as reflected on the Addendum, Capacity Release Deal No. 2700 ("Addendum") to Customer's Capacity Release Umbrella Agreement dated December 30, 1998, pursuant to which Canal permanently assigned its capacity rights under Algonquin's Contract No. 95500 to Customer; and

WHEREAS, Algonquin and Customer desire to enter into this Service Agreement which supersedes the Addendum and reflects that Customer has taken permanent assignment of the capacity specified in the Addendum;

In consideration of the premises and of the mutual covenants herein contained, the parties do agree as follows:

**ARTICLE I
SCOPE OF AGREEMENT**

- 1.1 Subject to the terms, conditions and limitations hereof and of Algonquin's Rate Schedule AFT-CL, Algonquin agrees to receive from or for the account of Customer for transportation on Algonquin's Canal Lateral facilities on a firm basis quantities of natural gas tendered by Customer on any day at the Point(s) of Receipt; provided, however, Customer shall not tender without the prior consent of Algonquin, at any Point(s) of Receipt on any day a quantity of natural gas in excess of the applicable Maximum Daily Receipt Obligation for such Point of Receipt; and provided further that Customer shall not tender at all Point(s) of Receipt on any day or in any year a cumulative quantity of natural gas, without the prior consent of Algonquin, in excess of the following quantities of natural gas:

Maximum Daily Transportation Quantity 75,000 MMBtu

Maximum Annual Transportation Quantity 27,375,000 MMBtu

Contract No. 95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

- 1.2 Algonquin agrees to transport and deliver to or for the account of Customer at the Point(s) of Delivery and Customer agrees to accept or cause acceptance of delivery of the quantity received by Algonquin on any day; provided, however, Algonquin shall not be obligated to deliver at any Point of Delivery on any day a quantity of natural gas in excess of the applicable Maximum Daily Delivery Obligation.

**ARTICLE II
TERM OF AGREEMENT**

- 2.1 This Agreement shall become effective as of January 1, 1999 and shall continue in effect until November 1, 2009 ("Primary Term") and shall remain in force from year to year thereafter unless terminated by either party by written notice one year or more prior to the end of the Primary Term or any successive term thereafter. Algonquin's right to cancel this Agreement upon the expiration of the Primary Term hereof or any succeeding term shall be subject to Customer's rights pursuant to Sections 8 and 9 of the General Terms and Conditions.
- 2.2 This Agreement may be terminated at any time by Algonquin in the event Customer fails to pay part or all of the amount of any bill for service hereunder and such failure continues for thirty days after payment is due; provided Algonquin gives ten days prior written notice to Customer of such termination and provided further such termination shall not be effective if, prior to the date of termination, Customer either pays such outstanding bill or furnishes a good and sufficient surety bond guaranteeing payment to Algonquin of such outstanding bill; provided that Algonquin shall not be entitled to terminate service pending the resolution of a disputed bill if Customer complies with the billing dispute procedure currently on file in Algonquin's tariff.

95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

**ARTICLE III
RATE SCHEDULE**

- 3.1 Customer shall pay Algonquin for all services rendered hereunder and for the availability of such service under Algonquin's Rate Schedule AFT-CL as filed with the Federal Energy Regulatory Commission and as the same may be hereafter revised or changed. The rate to be charged Customer for transportation hereunder shall not be more than the maximum rate under Rate Schedule AFT-CL, nor less than the minimum rate under Rate Schedule AFT-CL.
- 3.2 This Agreement and all terms and provisions contained or incorporated herein are subject to the provisions of Algonquin's applicable rate schedules and of Algonquin's General Terms and Conditions on file with the Federal Energy Regulatory Commission, or other duly constituted authorities having jurisdiction, and as the same may be legally amended or superseded, which rate schedules and General Terms and Conditions are by this reference made a part hereof.
- 3.3 Customer agrees that Algonquin shall have the unilateral right to file with the appropriate regulatory authority and make changes effective in (a) the rates and charges applicable to service pursuant to Algonquin's Rate Schedule AFT-CL, (b) Algonquin's Rate Schedule AFT-CL, pursuant to which service hereunder is rendered, or (c) any provision of the General Terms and Conditions applicable to Rate Schedule AFT-CL. Algonquin agrees that Customer may protest or contest the aforementioned filings, or may seek authorization from duly constituted regulatory authorities for such adjustment of Algonquin's existing FERC Gas Tariff as may be found necessary to assure that the provisions in (a), (b), or (c) above are just and reasonable.

**ARTICLE IV
POINT(S) OF RECEIPT**

Natural gas to be received by Algonquin for the account of Customer hereunder shall be received at the outlet side of the measuring station(s) at or near the Primary Point(s) of Receipt set forth in Exhibit A of the service agreement, with the Maximum Daily Receipt Obligation and the receipt pressure obligation indicated for each such Primary Point of Receipt. Natural gas to be received by Algonquin for the account of Customer hereunder may also be received at the outlet side of any other measuring station on the Canal Lateral, subject to reduction pursuant to Section 6.2 of Rate Schedule AFT-CL.

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

**ARTICLE V
POINT(S) OF DELIVERY**

Natural gas to be delivered by Algonquin for the account of Customer hereunder shall be delivered on the outlet side of the measuring station(s) at or near the Primary Point(s) of Delivery set forth in Exhibit B of the service agreement, with the Maximum Daily Delivery Obligation and the delivery pressure obligation indicated for each such Primary Point of Delivery. Natural gas to be delivered by Algonquin for the account of Customer hereunder may also be delivered at the outlet side of any other measuring station on the Canal Lateral, subject to reduction pursuant to Section 6.4 of Rate Schedule AFT-CL.

**ARTICLE VI
ADDRESSES**

Except as herein otherwise provided or as provided in the General Terms and Conditions of Algonquin's FERC Gas Tariff, any notice, request, demand, statement, bill or payment provided for in this Agreement, or any notice which any party may desire to give to the other, shall be in writing and shall be considered as duly delivered when mailed by registered, certified, or first class mail to the post office address of the parties hereto, as the case may be, as follows:

- (a) Pipeline: Algonquin Gas Transmission Company
5400 Westhiemer Court
Houston, TX 77056

- (b) Customer: Southern Energy Canal, LLC
900 Ashwood Parkway
Suite 490
Atlanta, GA 30338

or such other address as either party shall designate by formal written notice.

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

**ARTICLE VII
INTERPRETATION**

The interpretation and performance of the Agreement shall be in accordance with the laws of the Commonwealth of Massachusetts, excluding conflicts of law principles that would require the application of the laws of a different jurisdiction.

**ARTICLE VIII
AGREEMENTS BEING SUPERSEDED**

When this Agreement becomes effective, it shall supersede the following agreements between the parties hereto:

The Addendum (Algonquin's Capacity Release Deal No. 2700) to Customer's Capacity Release Umbrella Agreement which reflects the permanent assignment from Canal to Customer of the capacity specified in Algonquin's Contract No. 95500.

**ARTICLE IX
INCIDENTS OF TERMINATION**

- 9.1 If Customer elects to terminate this Agreement, then notwithstanding such termination Customer shall continue to pay the monthly Reservation Charge as provided under Algonquin's filed Rate Schedule AFT-CL until the earlier of (a) the date Algonquin recovers through said Reservation Charge the full original cost of the facilities attributable to the service which has been terminated, or (b) the date Algonquin makes effective its next general rate filing and begins receiving recovery on an alternate basis, which may include system-wide recovery of the costs of the facilities attributable to the service which has been terminated. At such time, Customer shall cease paying the Reservation Charge attributable to the terminated service. In addition, if and to the extent that Customer terminates this Agreement and the FERC or any other agency having jurisdiction over the facilities applicable to the service determines that such facilities are not used or useful in providing natural gas service on Algonquin's system or otherwise precludes Algonquin from recovering the full original cost of such facilities, then Customer shall reimburse Algonquin the remaining net book value of said facilities not

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

previously recovered by Algonquin through depreciation charges or otherwise. If subsequent to termination of this Agreement as provided in Article IX, Section 9.2 of this Agreement, Algonquin should commence providing a firm transportation service between the Point(s) of Receipt and Point(s) of Delivery in Exhibits A and B, respectively, then Customer shall receive credit against any monthly payments due under this Article IX for revenue received as a result of providing such service up to the level of payments due hereunder. Notwithstanding any other provisions in this Article IX, to the extent Algonquin does not receive full recovery of its cost, Customer shall be obligated to pay the difference between any revenues received by Algonquin and such full cost recovery amount.

- 9.2 Customer may terminate this Agreement prior to the end of the Primary Period by providing thirty days written notice of such termination to Algonquin and paying Algonquin the net book value of the facilities applicable to the service hereunder not previously recovered by Algonquin through depreciation charges or otherwise, plus any income taxes which may be paid by Algonquin on account of such payment by Customer. Payment of such costs shall not affect ownership or control of such facilities by Algonquin.

**ARTICLE X
POSSESSION AND WARRANTIES**

In addition to the provisions of Sections 20 and 21 of the General Terms and Conditions which shall be applicable to service provided pursuant to this rate schedule, Algonquin warrants that at the time of delivery to or for the account of Customer, the gas delivered hereunder shall be free and clear of all liens, encumbrances, and claims whatsoever resulting from Algonquin's possession or transportation of the gas pursuant to this rate schedule and the service agreement between Algonquin and Customer, and Algonquin agrees to indemnify Customer against any loss or cost incurred by Customer on account of all liens, encumbrances, or claims resulting from any such possession or transportation.

**ARTICLE XI
ASSIGNMENT**

Any Company which shall succeed by purchase, merger, consolidation or otherwise to the properties, substantially as an entirety, of Customer, shall be entitled to the rights and shall be subject to the obligations of its predecessors in title under this Agreement.

Contract No. 95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective agents thereunto duly authorized, the day and year first above written.

ALGONQUIN GAS TRANSMISSION COMPANY

By: _____ *pmr*

Title: _____

SOUTHERN ENERGY CANAL, LLC

By: _____

Title: _____

Contract No. 95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

Exhibit A

Point(s) of Receipt

Dated: _____

To the service agreement under Rate Schedule AFT-CL between Algonquin Gas Transmission Company ("Algonquin") and Southern Energy Canal, LLC ("Customer") concerning Point(s) of Receipt.

Primary Point of Receipt

Maximum Daily
Receipt Obligation
MMBtu

Maximum
Receipt Pressure
psig

Interconnection with
Algonquin's G-System in
Bourne, Massachusetts and
the Canal Lateral.

75,000

Algonquin's line pressure as
may exist from time to time.

Signed for Identification

Algonquin: _____ Jmm

Customer: _____

Supersedes Exhibit A Dated: _____

Contract No. 95500R1

**SERVICE AGREEMENT
(APPLICABLE TO RATE SCHEDULE AFT-CL)**

Exhibit B

Point(s) of Delivery

Dated: _____

To the service agreement under Rate Schedule AFT-CL between Algonquin Gas Transmission Company ("Algonquin") and Southern Energy Canal, LLC ("Customer") concerning Point(s) of Delivery.

Primary Point of Delivery	Maximum Daily Delivery Obligation MMBtu	Minimum Delivery Pressure psig
Interconnection between the Canal Lateral and Canal's Plant Extension.	75,000	150 psig subject to the availability of a sufficient pressure differential between the Point of Receipt and the Point of Delivery to effectuate such delivery

Signed for Identification

Algonquin: _____ *Jmm*

Customer: _____

Supersedes Exhibit B Dated: _____

contract 95500R1

**EXHIBIT B
TO
PROOF OF CLAIM OF
ALGONQUIN GAS TRANSMISSION COMPANY**

An electronic copy of Algonquin Gas Transmission Company's tariff can be obtained by accessing the Duke Energy website as follows:

1. Enter "www.link.duke-energy.com" to access the home page of Duke Energy's LINK System website.
2. Select the "Algonquin" link in the upper left hand corner of the LINK System home page.
3. Select the "Informational Postings" link in the upper left hand corner of the Algonquin home page.
4. Select the "Tariff" link in the upper left hand corner of the Informational Postings page.

Alternatively, a paper copy of Algonquin Gas Transmission Company's tariff can be obtained by submitting a written request addressed to the following:

Algonquin Gas Transmission Company
5400 Westheimer Court
P.O. Box 1642
Houston, TX 77251-1642
Attn: Marcy McCain, Regulatory Affairs Department